

NTSB Order No. EA-5291

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 5th day of June, 2007

Respondent.

Docket SE-17457

Respondent appeals the oral initial decision of Administrative Law Judge William E. Fowler, Jr., issued in this proceeding on February 1, 2006.¹ By that decision, the law judge affirmed the 45-day suspension of respondent's commercial pilot certificate for his violation of section 91.129(c)(1) of the

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Federal Aviation Regulations (FAR).² We deny the appeal.

The Administrator's July 6, 2005 suspension order alleged that respondent, acting as pilot-in-command (PIC) of a Bell 206L3 Longranger helicopter near Willow Grove, Pennsylvania, entered the Willow Grove Naval Air Station (Willow Grove) Class D airspace without first establishing two-way radio communications with Air Traffic Control (ATC). The order also alleges that, while in Class D airspace, respondent failed to maintain two-way radio communications with ATC, in violation of 14 C.F.R. § 91.129(c)(1). In this regard, the Administrator's order bifurcates the requirement of *establishing* ATC communications and *maintaining* ATC communications.

Respondent filed an answer to the Administrator's order, in which he admitted that he was PIC of the helicopter operating near Willow Grove and that he entered Class D airspace without first establishing two-way radio communications with ATC. Respondent, however, asserts that his "entry into that airspace was unintentional and inadvertent," and "was a result of an emergency situation." Answer to Compl. at 1. Respondent attributes the "emergency situation" to the inclement weather in

² FAR section 91.129(c)(1) requires that each person operating an aircraft in Class D airspace establish two-way radio communications with the ATC facility providing air traffic services prior to entering that airspace, and maintain such communications while within the airspace.

the airspace, and contends that the weather caused him to become disoriented. With regard to the Administrator's allegation that respondent failed to maintain ATC communications while in the airspace, respondent asserts that he maintained ATC communication once he established it. Respondent appears to assert that he acted reasonably under the circumstances, because, upon recognizing the airport as Willow Grove, he established "immediate two-way radio communication with that facility, advised them of his situation, requested and obtained a telephone number from them in order to furnish the details of his situation and, having then reoriented himself, promptly left the area, without landing." Id. In general, in response to the Administrator's charges, respondent asserts the affirmative defense of being in an emergency situation, based on 14 C.F.R. § 91.3.³

At the evidentiary hearing, the Administrator presented evidence from the perspective of the air traffic controllers at Willow Grove regarding respondent's incursion into Class D airspace, the terrain surrounding Willow Grove, the physical and

³ Title 14 C.F.R. § 91.3 allows PICs to depart from any rule of 14 C.F.R. part 91 when "an in-flight emergency requiring immediate action" occurs. Section 91.3(c) requires PICs who deviate from any rule as the result of an emergency situation to, upon the request of the Administrator, send a report describing the deviation to the Administrator.

geographic features of the runways at Willow Grove and Wings Airfield (Wings) (the airfield where respondent intended to land), and the weather on the day at issue. The Administrator also presented evidence from Mr. Thomas Lahovski, who investigated the allegations as the FAA air safety inspector. At the hearing, respondent offered his own testimony, as well as weather analysis and statements from his passengers. Respondent argued that he encountered an emergency situation and did what he determined to be necessary to save himself and his passengers. At the conclusion of the hearing, the law judge determined that it was clear respondent entered Class D airspace without establishing or maintaining two-way radio communications, and affirmed the Administrator's order of suspension.

On appeal, respondent argues that his failure to declare an emergency does not preclude the emergency authority bestowed upon a pilot by 14 C.F.R. § 91.3. Respondent also asserts that the testimony of the Administrator's witnesses was improper, because neither the non-pilot controllers nor the aviation safety inspector had flown in the area at low altitude. As such, respondent contends that the law judge erred in permitting ATC personnel to testify that a helicopter pilot, while flying low and in poor weather conditions, should have been able to

differentiate between Wings and Willow Grove. In addition, respondent asserts that Inspector Lahovski was not qualified or knowledgeable regarding the capabilities and flight characteristics of a helicopter, and that the law judge should not have allowed Inspector Lahovski to testify regarding helicopter flight. The Administrator's reply brief contests each of respondent's arguments, and urges us to affirm the law judge's decision on the basis that, if an emergency existed, respondent was responsible for that emergency situation, and his response was nonetheless unreasonable.

When a respondent raises an affirmative defense, such as the existence of an emergency that justifies his or her actions under 14 C.F.R. § 91.3, the respondent has the burden of proof regarding that defense. See Administrator v. Kalberg, NTSB Order No. EA-5240 at 3 (2006); Administrator v. Tsegaye, NTSB Order No. EA-4205 at n.7 (1994). In previous cases in which a PIC has asserted that his or her actions were reasonable in emergency circumstances, we have held that the respondent must establish a causal connection between the emergency situation and the departure from the regulatory requirements of 14 C.F.R. part 91. For example, in Administrator v. Smith, NTSB Order No. EA-5147 at 2 (2005), we held that neither an air traffic controller's question to respondent regarding whether respondent

was on a training flight, nor respondent's loss of radio communication, constituted an emergency that justified respondent's impermissible entry into Class B airspace.

Likewise, in Administrator v. Quinn, NTSB Order No. EA-4436 at 2 (1996), we held that respondent's disorientation due to a snowstorm and loss of radio communications did not justify her entry into Class B airspace, because the incursion was "a direct result of [respondent's] imprudent decision" not to return to a particular airport. Overall, in cases in which a respondent asserts that an emergency justified his or her deviation from any regulation in 14 C.F.R. part 91, the respondent must show that the emergency that he or she perceives directly caused a deviation from the regulations. Administrator v. Freeman, NTSB Order No. EA-3793 at 4 (1993); Administrator v. Wagner, NTSB Order No. EA-3047 (1990). Moreover, we have previously held that an emergency situation caused by a PIC's own actions does not excuse or justify departure from the regulations, and § 91.3 does not relieve the pilot from the duty to obey them. See Smith and Quinn, supra.

Based on the evidence in the record, we conclude that respondent's entry into Class D airspace was impermissible, and that respondent failed to both establish and maintain ATC communications. Respondent's incursion occurred prior to his

establishment of ATC communications; he did not establish contact until he was over the taxiway; therefore, he did not maintain contact from the time he entered until he was hovering over the taxiway.

With regard to respondent's assertion that an "emergency situation" justified his incursion into Class D airspace, we agree with the law judge's conclusion that the circumstances at issue cannot excuse respondent's violation of 14 C.F.R.

§ 91.129(c)(1). Any emergency that occurred was the result of respondent's own actions. Moreover, the record reflects that respondent did not take appropriate steps to reduce the risk of an incursion. Weather forecast information available before this flight indicated flying conditions would be marginal, with only "a mile and a half visibility," indicating that VFR flights would have been inappropriate. Tr. at 22-23, 43, 168-69, 171. Given the marginal weather conditions, Inspector Lahovski testified that respondent was obligated to "keep emergency options open ... if he was going to proceed along the route of flight that he was talking about." Tr. at 85.

In discussing respondent's use of Willow Grove as an emergency diversion airfield, Inspector Lahovski testified that respondent "should have had a contingency plan for the frequency, his position and location and all that sort of thing

so he could use it if he needed it." Id. Respondent's failure to have such a plan indicated his lack of preparedness and his failure to maintain "proper awareness of where he was." Id.

Overall, respondent has not met his burden of proving that emergency conditions caused his lack of preparedness and awareness. The record indicates that respondent was likely on a tight schedule (see Tr. at 126-27), and, as a result, determined the weather conditions would be satisfactory. When the conditions in the direction in which respondent proceeded had deteriorated, respondent could not turn around, because conditions behind him had also deteriorated, so he began maneuvering around the weather. Respondent became disoriented, proceeded into the airspace, and began to realize his location only when he saw military aircraft. Based on this record, an appropriate flight plan would have helped respondent avoid this situation; therefore, no emergency existed pursuant to 14 C.F.R. § 91.3.

We find that a preponderance of reliable, probative, and substantial evidence supports the law judge's decision affirming the suspension of respondent's commercial pilot certificate.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The 45-day suspension of respondent's certificate shall

begin 30 days after the service date indicated on this opinion and order.⁴

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

⁴ For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).